Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NO. 79-1444

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

Statement

This brief if submitted in reply to the briefs of respondents Gordon M. Ambach as Commissioner of Education of the State of New York ("Commissioner") and the President and Board of Trustees of Fashion Institute of Technology ("FIT").

The complete official citation of the judicial case below is *Matter of Zangrillo v. Ambach,* 70 AD2d 790 (Appellate Division, Third Department, 1979), motion for leave to appeal

denied, 48 NY2d 611 (1979). The administrative decision is reported in the New York State Education Reports as *Appeal of Frances Leto Zangrillo,* 17 Ed. Dept. Rep. 98 (1977).

We apologize for the error in our petition at page 19, third line from the bottom, where we state the date of petitioner's termination as January 31, 1965. It should have read January 31, 1968.

ARGUMENT

POINT I

Petitioner Had Been Reinstated and Promoted in Rank in Full Compliance with her Public Employer's Reinstatement Bylaw Before She Was Summarily Terminated After A Semester's Teaching

Respondents' briefs leave intact and uncontested the facts that petitioner, as a tenured teacher at FIT, went out on maternity leave effective February 1st, 1963 and did not return when the leave, as extended, expired at the end of January 31, 1965; that in the summer of 1967 petitioner's department chairman promised her the first full-time opening if she would teach part-time in the Fall 1967 semester (Petition, p. 21); and that accordingly petitioner resumed teaching at FIT in September 1967 only to be dropped from faculty as of January 31, 1968 (Petition, p. 13a).

Both respondents lay great stress on the theory that petitioner's failure to return from leave by February 1st, 1965 caused her tenure to be forfeited. Thus the Commissioner's Brief at p. 12:

> "Petitioner's arguments with regard to an alleged violation of her rights pursuant to subdivision (8) and (9) of section 2587 of the Education Law simply ignore the fact that she failed to return from her extended maternity leave in 1965, and that such failure to return constituted a constructive resignation of her position with a loss of her tenure rights."

And FIT's Brief, seeking to make the most of conclusory statements in an arbitration proceeding, states at pp. 10, 11:

> " * * * Petitioner candidly admits in the petition (p. 3) that she 'overstayed' her maternity leave. More significantly, she conceded at the arbitration proceeding and the Arbitrator found that:
>
> 'Lapse or expiration of the maternity leave on or about February 1, 1965 is agreed by the parties to have constituted a (constructive) resignation'."

In this connection the Commissioner's Brief, at p. 11, says:

> "Petitioner's real grievance with respondent board of trustees was caused by a change in respondent's policy of reinstatement from one of unqualified eligibility for reinstatement in the same rank within 10 years, to a policy of reinstatement in the discretion of president of the institution . * * * "

And here the Commissioner's Brief makes a seriously misleading error in its statement of the case, p. 5:

> " * * * Upon her [petitioner's] failure to return from maternity leave, petitioner was deemed to have submitted her resignation. The bylaws of the institution, which had provided for an unqualified right of reinstatement within ten years after the resignation of a faculty member, were amended *prior* to petitioner's maternity leave to provide that faculty members who resign shall be eligible for reinstatement in the same rank within ten years, and re-employment by the President within his discretion." (emphasis added to stress the inaccuracy)

To correct the error while preserving its effect, FIT's Brief says at p. 5:

"The College's bylaws that were in effect at the time she [petitioner] requested the extension of her original maternity leave provided as follows:

'Faculty members who resign shall be eligible for reinstatement in the same rank within ten years and reemployment by the President within his discretion.' (Emphasis added)."

At the time of petitioner's departure on maternity leave effective February 1st, 1963 and for several years prior thereto, the reinstatement bylaw of FIT read:

"Faculty members who resign shall be eligible for reinstatement in the same rank within ten years."

And it was not until October 14, 1963, about eight months after her baby was born, that the bylaw was amended to add the phrase:

"and reemployment by the President within his discretion." (Petition, p. 13a)

It follows therefore that it is literally true that the amendment of the bylaw had been made and was in place when petitioner, at home with her infant, applied for the extension of the leave to cover the period from February 1, 1964 to January 31, 1965.

But the cream of a very cruel jest is that, in her restoration to faculty effective the September 1967 semester, and putting to a side the contractual impact, additional to that of the tenure statute and the reinstatement bylaw, of FIT's promise to give petitioner the first available full-time opening, petitioner returned to faculty in complete compliance with and fulfillment of all requirements of the reinstatement bylaw, both in its original and amended versions.

Thus, instead of achieving "reinstatement in the same rank" — and surely the tenure status of an individual is a component of his rank — as provided by both versions of the reinstatement bylaw, petitioner was promoted to the rank of adjunct assistant professor and, with the approval of the college president, given a teaching position in her department. Thus, the notification letter of FIT's dean and vice president:

"August 29, 1967

Dear Mrs. Zangrillo:

We are recommending your name *to the president for his certification to our Board of Trustees* for assignment as an adjunct assistant professor in the Apparel Design Department for the Fall semester as of September 1967.

* * * * * " (emphasis supplied)

We believe that the case for petitioner's property right in her tenure as of January 31, 1968 at FIT, tenure rights as created, defined and protected by the New York Education Law §2587 (Petition, pp. 5-8) is compelling, and that the violation of those rights by FIT's summary termination action of January 31, 1968 plus the denial to her of any review of the merits of that termination, administrative or judicial, constitute a substantial deprivation of petitioner's property without due process of law within the meaning of the Fourteenth Amendment of our federal constitution.

POINT II

Respondents' Attempts, After Foreclosing Her Right to be Heard, to Demonstrate Substantive Defenses to her Claims, Disclose a Settled Hostility to Fair Adjudication of her Claims Without Prejudgment

Unmistakeably adversary is the array of alternate courses suggested by respondents for petitioner (Commissioner's Brief, pp. 8, 13-15; FIT Brief, p. 9) whom, they suggest, with notable lack of charity, was always wrong in her choice of remedies and always late in getting there. Yet when these alternate suggested courses are examined — direct judicial suit under Education Law §2587, invocation of the State Executive Law for either an administrative proceeding to the State Division of Human Rights or judicial action in State Supreme Court; judicial application to set aside an arbitration award incapable of binding a party against the tenure mandant of a statute, and finally, suit under 42 U.S.C. §1983 either in the district court or in the State court — none seem to go as directly to petitioner's litigating objective as the tenure statute, Education Law §2587, with its seeming grant of an exclusive review jurisdiction to the Commissioner.

Needless to say the litigating advice given by petitioner's adversaries leaves plenty of room for effective defense. A good example is furnished at page 13 of the Commissioner's Brief:

> "The most appropriate method to review the refusal of the Fashion Institute of Technology to re-employ petitioner, particularly in view of petitioner's reliance upon the provisions of section 2587 of the Education Law, would have been by a special proceeding in the State Supreme Court commenced pursuant to the provisions of Article 78 of the Civil Practice Law and Rules."

Aside from the fact that such a course was taken in the second cause of action pleaded in the proceeding to review the

Commissioner's rejection of jurisdiction with consequent dismissal "on the merits" (Petition, pp. 14, 15; 6a), one can readily imagine both a court's reaction to the statute's exclusive grant of review jurisdiction to the Commissioner (Petition, p. 7) as complemented by Education Law §308 (petition, p. 8), saying of the Commissioner,

> "*** it shall be his duty to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof ***."

It would hardly be likely that a court would decree relief in such a situation and the result might be as prejudicial to petitioner's claims as the actuality in Supreme Court, Albany County (Petition, pp. 4a-6a).

In spite of the bugaboo of state grounds of decision precluding a review for claimed federal constitutional violations, petitioner must perforce rely on this Court's observation in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 82 (1978):

> "*** Because property interests are creatures of state law, Perry v. Sindermann, 408 U.S. 593, 599-603, respondent would have been required to show at trial that her seat at the Medical School was a 'property' interest recognized by Missouri state law.***"

And in thus relying on the statute that created and protected her property interest of tenure at FIT, petitioner took what was probably the only valid course open to her for the establishment and enforcement of her statutory property rights, and the enforcement of federal due process guarantees should state agencies—her employer, the Commissioner, the State courts—fail to accord her her federal due.

In the light of a situation where the property interest sought to be protected is a creature of state law, and a statutory creation at that, obviously such rights must be enforceable primarily

as statutory rights in statutorily prescribed modalities which was exactly what petitioner did in an exhaustive line of review. In such a case we feel that the federal 14th Amendment due process guarantees and protections are sufficiently robust to be deemed invoked and not defeated when, as here, rather than hypothesizing an anticipated constitutional violation inherent in the destruction of the statutory property right sought to be enforced, it is pointed out to both the Commissioner and Special Term of Supreme Court, Albany County that the rights sought to be enforced in the litigation have a constitutional foundation. And when and if action violative of constitutional rights is taken—as, for example, when Special Term made its judgment foreclosing any administrative or judicial review of FIT's summary termination action of January 31, 1968 (Petition, pp. 4a-6a), it then becomes appropriate to make such explicit objection on specified constitutional grounds as the occasion requires. The litigating course taken by petitioner was, in its origins, statutory rather than constitutional under a common sense principle that decries unnecessary escalation of a statutory issue into a constitutional one. By the same token the litigant does not lose his constitutional protections unless the occasion presents a situation where they clearly should be invoked but are not.

The treatment by the Commissioner of the issue of limitations—after he has declined jurisdiction—is very one-sided. In a range of limitations from 4 months through one year to six years for a suggested list of litigating alternatives, all starting from the termination of January 31, 1968 and going to May 4, 1976,* the starting date of the administrative appeal to the Commissioner, manifestly the time gap is too great, on the Commissioner's formulae, to be timely. But the Commissioner assumes that limitations make no provision for a situation of contemporaneously concealed facts which later discovery uncovers—precisely the situation that befell the petitioner.

*Erroneously, both the Justice at Special Term (Petition, p. 9a) and FIT in its Brief at p. 4, make 1977 the starting date of the administrative appeal.

Petitioner had been let go as of January 31, 1968 on the pretext that no work was available but that she should inquire about openings from time to time, but:

> "*** she still sought full-time employment at F.I.T. but without success.
> "In the Spring of 1972, having been passed by for reemployment while others were hired, Mrs. Zangrillo retained counsel to assist in pressing her claim for reemployment." (Petition, pp. 21, 22)

Unaware, or at least unable to prove the discriminatory nature of the January 31, 1968 separation, when petitioner was reinstated for the second time in February 1973 and received the pay of an assistant professor on the first salary step, she shortly initiated the collective bargaining grievance procedure seeking the pay of an assistant professor on the fourth salary step. Contrary to FIT's assertion at page 3 of its Brief, petitioner did not in her filed grievance or at any early stage protest "the loss of her tenure rights" for the reason that she was in no position to prove, at that time, that the layoff of January 1968 ostensibly for lack of available work, was, in fact, a termination in favor of untenured newcomers illegally discriminatory as to her tenure rights.

It was only in the course of the arbitration proceedings resulting in an adverse award of March 22, 1976 that the internal Memorandum to the College President of June 22, 1972 (Petition, pp. 13a, 14a; Appendix C) was discovered to her with its pithy, brutal notation:

> "At the end of that semester, she was dropped, January 31, 1968."

And, of course, its self-righteous exposition of "rights and seniority voluntarily given up to stay home"; and "The other Part-Time members of the department were felt to have seniority if any full-time openings became available", gave petitioner smarting insight into just how trustworthy was the inducing pro-

mise of an FIT department chairman to give her the next full-time opening.

Between the discovery in the arbitration ending March 22, 1976 and the appeal to the Commissioner of May 4, 1976 is, of course, but a few weeks. But the implications of that discovery shed light on the utter fraud upon her valuable property rights in concealing the permanent, illegal termination with the trappings of a layoff for lack of work, soothingly asking her to inquire from time to time and always, falsely, telling her that no openings had presented, while, at the same time, quietly moving the favored and untenured part-time and evening people into full-time positions.

The Commissioner, charged with quasi-judicial function of hearing and adjudicating administrative appeals, has, in his Brief, found only limitations which would bar the claim were he constrained to exercise jurisdiction. Nowhere does he mention New York Civil Practice Law and Rules §203(f):

> "(f) Time computed from actual or imputed discovery of facts. Except as provided in article 2 of the uniform commercial code, * * * where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer."

and while mentioning CPLR §213(1), the six year limitations for statutory actions such as enforcing Education Law §2587, he does not mention section 213(8), the six year limitations for fraud:

> "8. An action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."

Of the interaction of CPLR §203(f) with §213(8), in *Government of India v. Cargill, Inc.*, 445 F.Supp. 714 (S.D.N.Y. 1978), Tenney, D.J., observed at p. 720:

> "Parallel principles of justice apply in New York to the limitation of an action for fraud. The mandates of both N.Y.C.P.L.R. §203(f) and §213(8) govern the time limitations for institution of claims based on that tort, and the two have been construed together to provide for alternate limitations where discovery of fraud is delayed; the plaintiff has two years from discovery or six years from accrual, whichever is longer. ***"

At this point we think that what may appear to be a diversion actually fits in. The Commissioner's Decision of September 28, 1977 (Petition, pp. 10a-12a; 17 Ed. Dept. Rep. 98) attempts to downgrade the issue presented to him from petitioner's prayer for a make-whole remedy for the violation, on January 31, 1968, of her tenure rights under §2587 of the Education Law, to a mere non-statutory squabble "with regard to salary" disposable under the doctrine of *Matter of Bowen v. Allen*, 17 AD2d 12, affd. no opinion, 13 NY2d 663 (1963), but avoiding the appearance of turning the case into a judicial repeal of statutes requiring the Commissioner to enforce *any* statutory provision of the Education Law. Thus the opening sentence of his Decision:

> "This appeal concerns the appropriate placement of petitioner on the salary schedule for assistant professors employed by the Fashion Institute of Technology."

Nowhere in his Decision does the Commissioner as much as mention Education Law §2587 nor the fact that the whole thrust of the administrative appeal was to have him enforce the statute. And notwithstanding that the Justice at Special Term said in his memorandum decision (Petition, p. 9a):

"*** petitioner commenced an appeal before the Commissioner of Education wherein she claimed that *** Fashion Institute of Technology, violated the provisions of Section 2587 of the Education Law.***",

the Commissioner's Brief persists in refusing to regard the matter on the terms and premise which it presented to him, viz., his duty under Education Law §§2587(9) and 308 to hear and enforce petitioner's *statutory* claims. Thus, the Commissioner's Brief at pp. 11, 12:

"The ongoing dispute between petitioner and respondent board of trustees concerns the appropriate placement of petitioner on respondent's salary scale, for which petitioner appealed to the Commissioner. Although petitioner continues to allege a violation of the provisions of section 2587 of the Education Law, it is respectfully submitted that section 2587 is irrelevant to the dispute between petitioner and her employer, and that her cause of action is in reality premised upon the provisions of the contract between the Fashion Institute of Technology and the collective bargaining unit representing the teachers at such institution. The gist of petitioner's complaint is that she was not offered full-time employment at the appropriate level when she desired to be reinstated as a teacher at Fashion Institute of Technology. Such reinstatement is not dependent upon the provisions of section 2587, ***"

The distortion done by the Commissioner's version of the facts as well as the position of petitioner with regard to limitations are made crystal clear by the allegations of the petition initiating the administrative appeal to the Commissioner. Thus:

"8. Notwithstanding that, under the provisions of section 2587 of the Education Law, I could not be removed and separated from my tenure except under the procedures and for the reasons therein specified, I was dropped from the faculty at the end of the September 1967 through January 1968 semester. The fact that I was illegally dropped was concealed from me; I inquired frequently for employment and was told each time that

nothing had opened up. I did not learn of this deliberate violation of my statutory tenure rights until a memorandum of June 22, 1972 prepared for President Feldman by the then Chairman, Prof. Hilda Friedman (Grievant's Exhibit W, annexed hereto) first became available to me in an arbitration hearing session, after which the arbitrator concluded that my claims with respect to discriminatorily illegal treatment were 'now time-barred'."

And if, speaking to limitations again, the Commissioner were to argue that limitations based on discovery apply only to the narrow confines of an action for fraud and deceit, he would, as an administrative adjudicator, be ignoring the fact that the real question tendered in the case on the issue of limitations was whether an illegal discrimination in violation of personal property rights created, granted and protected by statute, and of which the owner may not constitutionally be deprived without due process of law, is to be perpetuated and made a success because successfully concealed during the period of limitations, or whether the remedial statute as well as the constitutional protection may still be vindicated and the discrimination undone by timely action following discovery.

In law, the type of concealment that saps one's right of tenure, or any other kind of property, is an estoppel creating phenomenon with respect to limitations. Thus in *Government of India v. Cargill, Inc.*, 445 F. Supp. 714 (S.D.N.Y. 1978), at p. 719:

"The doctrine of equitable estoppel in New York derives directly from *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959), the holding of which is expressed in the simple maxim that 'no man may take advantage of his own wrong.' *Id.* at 234. The New York Court of Appeals forthrightly adopted *Glus* in *General Stencils, Inc. v. Chiappa,* 18 N.Y. 2d 125 (1966).***"

Nor is the principle of equitable estoppel with respect to limitations any longer a matter only of case law. For the principle has its statutory embodiment in the New York General

Obligations Law §17-103, dealing with agreements waiving the Statute of Limitations, and providing in subsection (4)(b) thereof:

"4. This section

***

b. does not affect the power of the court to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitations; ***"

Nor should a continuing wrong stemming from her illegal deprivation, without the due process of the tenure statute's required hearing on charges and without an administrative or judicial review of the merits of FIT's termination action of January 31, 1968, be allowed to blight petitioner's career so that 24 years after she started teaching at FIT, petitioner is still an assistant professor—one rank over her starting rank—while every one of her contemporaries, with or without overstayed maternity leaves, has long reached the top step of the top rank of full Professor.

We respectfully renew our prayer that a writ of certiorari be granted herein.

Dated: New York, New York
May 21, 1980.

Respectfully submitted,

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